IN THE

Supreme Court of the United States

October Term, 1975

No. ~~75~~ - 1040

STUART L. STEINBERG,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY S. ARKIN, P.C.
300 Madison Avenue
New York, New York 10017
(212) 869-1450
Attorneys for Petitioner

STANLEY S. ARKIN
MARK S. ARISOHN
Of Counsel

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Stuart L. Steinberg, petitioner herein, prays that a Writ of Certiorari issue to review the judgment entered in this criminal case by the United States Court of Appeals for the Second Circuit on November 10, 1975. This case involves wiretap issues of extraordinary and nationwide significance which have been resolved in a conflicting manner by the federal courts and never addressed by this Court.

Opinions of the Courts Below

The opinion and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed is reproduced in Appendix A and is not yet reported. The unpublished memorandum opinion delivered by the United States District Court for the Southern District of New York appears in Appendix B.

Jurisdiction of the Supreme Court

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 10, 1975. Petitioner's timely petition for rehearing was denied on December 24, 1975. Title 28, United States Code, Section 1254(1) and Rule 22(2) of the United States Supreme Court Rules confer jurisdiction on this Court to review the judgment in question by a Writ of Certiorari.

Questions Presented for Review

1. Does the government's conclusory assertion in its wiretap application that "normal investigative procedures" were tried and otherwise appeared futile satisfy Title III's explicit requirement of a "full and complete" factual showing that investigative means short of wiretapping were "unlikely to succeed if tried" where the application contained no information regarding "normal investigative procedures" contemplated by the government nor an explanation of why such procedures were unlikely to succeed in this case?

2. Did the Court of Appeals for the Second Circuit err by employing a standard of "substantial compliance" in determining whether the government's wiretap application satisfied Title III's requirement of a "full and complete" factual showing that investigative means short of wiretapping were "unlikely to succeed if tried" rather than the "strict compliance" standard envisioned by Congress and required by this Court?

Constitutional Provisions and Statutes Involved

Constitution

Constitution of the United States of America, Fourth Amendment.

Statutes

Title 18, United States Code, §2518(1)(c);
Title 18, United States Code, §2518(3)(c).

Each of the above is set forth in Appendix D.

Statement of the Case

Petitioner was convicted on April 8, 1975, in the United States District Court for the Southern District of New York, of conspiracy (21 U.S.C. §846), distribution and possession with intent to distribute a controlled substance (21 U.S.C. §841[a][1]), and use of the telephone in facilitating the commission of the conspiracy (21 U.S.C. §843 [b]). He was sentenced to an 18-month term of imprisonment (to be followed by a 3-year period of special parole) and a $10,000 fine.

Prior to trial, petitioner moved in the district court to suppress wiretap evidence upon the ground, *inter alia*, that there was insufficient factual basis in the government's wiretap application (see Appendix C1-C14) to enable the issuing judge to make the required determination that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed or to be too dangerous" (18 U.S.C. §§2518[1][c], [3][c]). The motion was denied by the trial court on December 27, 1974 without a hearing (see Appendix B1-B4).

On November 10, 1975, the United States Court of Appeals for the Second Circuit affirmed petitioner's conviction (see Appendix A1-A18)* and on December 24, 1975, denied a petition for rehearing.

Execution of petitioner's sentence was stayed pending his appeal to the Court of Appeals and the issuance of the mandate by the Court of Appeals was stayed on January 7, 1976 pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure for a period of 30 days pending this petition.

REASONS FOR GRANTING THE WRIT

POINT I

The government's wiretap application failed to contain a sufficient factual showing that normal investigative procedures had been tried and failed or were unlikely to succeed, and the Second Circuit's holding to the contrary seriously conflicts with Third Circuit, Ninth Circuit, and other recent federal authority.

The government's July 18, 1973 wiretap application contained no factual support for its sterile recitation tracking statutory language that "normal investigative procedures have been tried and failed to and further normal procedures reasonably appear to be unlikely to succeed and are too dangerous to be used, if tried" (Government application, see Appendix C4).

* The conviction of two of petitioner's co-defendants was reversed by the Second Circuit because there was insufficient evidence to support the allegation that they participated in the conspiracy charged (see A13-A15).

The government claimed in conclusory fashion that "because of the covert manner in which Stuart L. Steinberg operates" there was "no known undercover access to his supplier and no chance of developing such access" (affidavit submitted in support of wiretap application, C13). Additionally, it was asserted that in the general experience of the Drug Enforcement Administration "individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance * * * very rarely keep records, deal personally with a few trusted individuals and isolate themselves from other individuals in the distribution organization" (*id.*, C13).

No factual basis whatever was provided for the government's assertion that *Steinberg* operated in a "covert manner." Nor was there even a blush of a showing that *Steinberg* was the sort of person to be reasonably included within the government's generalization relating to "individuals dealing in large quantities of narcotics," who are "particularly covert in their activities and wary of surveillance * * *."

Moreover, the application failed to make a single factual reference to a "normal investigative procedure" which was tried and failed or which the government contemplated using but determined likely to fail if tried or to be too dangerous to use.

Steinberg argued in the Second Circuit that the wiretap application was deficient and the issuance of wiretap orders improper because the government's failure to include a "full and complete" factual statement as to whether or not other normal investigative procedures had been "tried and

failed'' or why they ''reasonably appear[ed] to be unlikely to succeed if tried or to be too dangerous,'' made it impossible for the issuing judge to make that determination (18 U.S.C. §§2518[1][c], [3][c]).

The Second Circuit observed that the Steinberg wiretap application ''provide[d] little factual basis for concluding that normal investigative techniques had not 'suffice[d] to expose the crime'" (A5), and warned the government that ''in the future'' it should ''include a more detailed factual statement indicating the inadequacy of other investigative techniques * * *'' (A6). What the Court relied on to justify its finding that there had been ''substantial compliance'' with Title III's requirement that there be a factual showing of ''necessity'' for the wiretap, *i.e.*, that less drastic and obnoxiously intrusive means of investigation were not likely to succeed, were three circumstances: the description in the application of pre-wiretap drug transactions between Steinberg and government agents; Steinberg's use of the telephone in ''initiat[ing] and arrang[ing]'' these transactions and in ''contact[ing] his supplier[s];'' and the *mutual* desire of Steinberg's *suppliers* and the *undercover government agent* not to meet each other (A4).

None of these circumstances has any conceivable relevance to the efficacy of alternative means of investigation which were either used or contemplated.

The explicit requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2518(1)(c) and (3)(c), manifest a congressional effort to prevent law enforcement agents from proceeding by way

of wiretapping unless the government is able to make a ''full and complete'' factual showing that other conventional means of investigation are unavailable or unlikely to succeed.*

In commenting upon Title III's requirement that the application demonstrate and the authorizing judge find that ''normal investigative procedures'' have either failed or appear unlikely to succeed, this Court, in *United States* v. *Kahn,* 415 U.S. 143, 153, n.12 (1974), wrote:

> ''This language * * * is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.''

And in *United States* v. *Giordano,* 416 U.S. 505, 515-16 (1974), this Court wrote:

> ''The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not

* Indeed, the Justice Department's manual on the use of electronic surveillance states:

> "Each request for authorization should contain . . . [a] complete description of the investigation being conducted—its origin, development, and present status. This description must include a detailed analysis of all investigative procedures utilized and considered and a statement as to the reasons for their inadequacy." (U.S. Department of Justice, Manual for Conduct of Electronic Surveillance, p. 8 [1969]).

to be routinely employed as the initial step in criminal investigation."

In language particularly apposite here, the Court continued, *id.*, 416 U.S., at 521:

> "* * * we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

Here, in violation of the statute's language and intent, wiretapping was resorted to reflexively "as the initial step" despite the complete absence of a government factual showing establishing the unavailability or impracticability of "traditional investigative techniques."

The Second Circuit's ruling that the government's wiretap application contained "enough data" (A6)* to comply with the statutory mandate of a factual showing of the inadequacy of normal investigative techniques is in serious conflict with recent decisions of the Third and Ninth Circuits and other federal courts.

In *United States* v. *Kalustian*, —— F. 2d ——, Docket No. 74-3314 (9th Cir. Aug. 4, 1975),** the Ninth Circuit

* As stated above, the Second Circuit found the government's description in the wiretap application of Steinberg's pre-wiretap unlawful activities, his use of the telephone in conducting those activities, and the desire on the part of Steinberg's suppliers and the undercover government agent not to meet each other sufficient compliance with 18 U.S.C. §2518(1)(c).

** The government's petition for a Ninth Circuit rehearing *in banc*, filed on October 16, 1975, is pending.

suppressed wiretap evidence because the government's wiretap "application did not adequately show why traditional investigative techniques were not sufficient in [that] particular case" (*id.*, op. at 5). The government's application for the Kalustian wiretap contained far more "data" from which an authorizing judge could determine for himself the likelihood for success of non-wiretap means of investigation than did the Steinberg application. Specifically, the Kalustian application alleged that government informants were unwilling to "testify to information they * * * provided" (*id.*, op. at 2) and that there was a low "probability of success in securing presentable evidence" through "such investigative techniques as physical surveillance and the records obtainable" (*id.*, op. at 2).

But the Ninth Circuit found even these assertions insufficient to comply with the directive of 18 U.S.C. §2518(1)(c) because they failed to "enlighten [the court] as to why this * * * case presented any investigative problems which were distinguishable in nature or degree from any other * * * case" (*id.*, op. at 5). That Court held in order to satisfy the requirement of 18 U.S.C. §2518(1)(c):

> "The Government must (1) inform [the authorizing judge] of every technique which is customarily used in * * * investigating the type of crime involved, and (2) explain why each of them * * * is * * * unlikely to succeed because of the particular circumstances of that case." (*Id.*, op. at 6.)

The factors relied upon by the Second Circuit in upholding the Steinberg wiretap disclosed no information regarding traditional investigative techniques and had no bearing

whatever on why alternative techniques were unlikely to succeed.

The court in *United States* v. *Curreri*, 388 F.Supp. 607 (D. Md. 1974), suppressed wiretap evidence because the government's application contained no factual support to enable the issuing judge to find that other means of investigation appeared futile. That court wrote as follows (*id.*, 388 F. Supp., at 620):

> "While there may [be] eminently sound reasons why these investigative techniques were not considered likely to succeed, if tried, *those reasons were not made known to* [*the issuing judge*] *in the application* * * *." (Emphasis added.)

Other federal court decisions upholding wiretap applications establish by comparison the patent insufficiency of the Steinberg application. In *United States* v. *Armocida*, 515 F. 2d 29 (3d Cir. 1975), the Third Circuit held a wiretap application sufficient because it revealed a history of unsuccessful use of physical surveillance, undercover agents,* and an informant unwilling to testify. Similar findings were made in *United States* v. *Kerrigan*, 514 F. 2d 35 (9th Cir. 1975), *cert. denied*, —— U.S. ——, 44 U.S.L.W. 3258 (Nov. 4, 1975). There, the wiretap application detailed the failure of the government's three-month investigation,

* In the instant case the government had successfully established undercover access. *Compare, United States* v. *James*, 494 F. 2d 1007 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1020 (1975); *United States* v. *Falcone*, 364 F. Supp. 877 (D.N.J. 1973), *aff'd*, 505 F. 2d 478 (3d Cir. 1974), *cert. denied*, —— U.S. —— (1975); *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972), *aff'd, sub nom. United States* v. *Giordano*, 469 F. 2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

including a physical surveillance* which established a tight security scheme utilized by the suspects, and the use of informants** who were unwilling to testify even if granted immunity. And in *United States* v. *Baynes*, 400 F. Supp. 285 (E.D.Pa. 1975), the court upheld a challenged wiretap application which alleged that informants and other witnesses had no knowledge of the extent of the suspect's activities, physical surveillance on the suspect's premises would be detected and jeopardize the investigation, and infiltration by government agents was not possible.

Unlike *Armocida*, *Kerrigan* and *Baynes*, the government's wiretap application in this case provided not one assertion of fact from which an issuing judge could determine that normal investigative means were not apt to succeed. Reliance by the Second Circuit on factors which are totally unrelated to the probability of success of non-wire-

* The government's application here made no reference at all to visual surveillance which may have been conducted or even contemplated. *Compare, United States* v. *Bobo*, 477 F. 2d 974 (4th Cir. 1973), *cert. denied*, 421 U.S. 909 (1975); *United States* v. *Falcone*, *supra*; *United States* v. *Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972); *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States* v. *Leta*, 332 F. Supp. 1357 (M.D. Pa. 1971); *United States* v. *Escandar*, 319 F. Supp. 295 (S.D. Fla. 1970), *rev'd on other grounds sub nom. United States* v. *Robinson*, 468 F. 2d 189 (5th Cir. 1972), *rehrg. en banc*, 472 F. 2d 973 (5th Cir. 1973) (*per curiam*); *United States* v. *Focarile*, *supra*.

** Again, there was no reference in the application here relating to informants who were unwilling to testify. *Compare, United States* v. *O'Neill*, 497 F.2d 1020 (6th Cir. 1974); *United States* v. *Bobo*, *supra*; *United States* v. *Lanza*, 356 F. Supp. 27 (M.D. Fla. 1973); *United States* v. *Mainello*, *supra*; *United States* v. *Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972), *rev'd on other grnds.*, 474 F. 2d 1246 (3d Cir. 1973), *cert. denied*, 412 U.S. 953 (1973); *United States* v. *Leta*, *supra*; *United States* v. *Escandar*, *supra*; *United States* v. *Askins*, 351 F. Supp. 408 (D. Md. 1972).

tap investigative efforts negates the clear intent of the statutory provision and directly conflicts with rulings of other federal courts.

Certiorari should be granted to resolve the Second Circuit's conflict with other federal courts on this important wiretap issue.

POINT II

The "substantial compliance" standard used by the Second Circuit in determining whether Title III's necessity requirement was met conflicts with congressional intent, this Court's decisions and the rulings of other federal courts which require "strict compliance."

In determining that the government satisfied the Title III requirement of establishing that normal investigative procedures would be unlikely to succeed, the Second Circuit employed a test of "substantial compliance" with the statute (A6).*

By applying a test of "substantial compliance" the Second Circuit ignored decisions of this Court and other federal courts of appeal as well as congressional intent

* Thus, the Second Circuit wrote as follows (A6):

"We are satisfied that the Government has *substantially complied* with the statutory mandate * * *." (Emphasis supplied).

Other federal district courts have applied the same standard. See *e.g., United States* v. *Tortorello*, 342 F.Supp. 1029, 1036 (S.D.N.Y. 1972), *aff'd on other grounds*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States* v. *Falcone*, 364 F. Supp. 877, 889-90 (D.N.J. 1973), *aff'd on other grounds*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, —— U.S. —— (1975); *United States* v. *King*, 335 F.Supp. 523, 535 (S.D. Cal. 1971), *modified on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States* v. *Escandar, supra*, 319 F.Supp. 295.

which mandate a "strict compliance" with Title III procedures.

This Court has held that failure to *strictly* follow Title III's provisions will result in suppression. Thus, in *United States* v. *Giordano*, 416 U.S. 505 (1974), despite strong government importuning to the contrary, the Title III provision requiring wiretap authorization by the Attorney General or a specifically designated Assistant Attorney General (18 U.S.C. §2516[1]) was construed in strict accordance with statutory language.

Significantly, the provision of Title III with which this Court required "strict compliance" in *Giordano, supra*, is not constitutionally based. Contrariwise, the "necessity" provision of Section 2518(1)(c) is rooted firmly in the Fourth Amendment principles that a continuous search without notice—such as a wiretap—requires a factual showing of "exigent circumstances" and that "no greater invasion of privacy [is] permitted than that *necessary* under the circumstances." *Berger* v. *New York*, 388 U.S. 41, 57 (1967); *Katz* v. *United States*, 389 U.S. 347, 355 (1967); ABA Standards Relating to Electronic Surveillance (1971), p. 140.

Again, in *United States* v. *Chavez*, 416 U.S. 562 (1974), this Court warned that:

> "*strict adherence* by the Government to the provisions of Title III would * * * be * * * in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping * * * is sought." (*Id.*, 416 U.S., at 580.) (Emphasis supplied.)

The circuit courts, too, have required "strict compliance" with Title III provisions. See, *e.g., United States* v. *Bellosi,* 501 F.2d 833, 836-37 (D.C. Cir. 1974); *United States* v. *Martinez,* 498 F.2d 464, 468 (6th Cir.), *cert. denied,* 419 U.S. 1056 (1974); *United States* v. *Cox,* 449 F.2d 679, 684 (10th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972).

The legislative history of Title III establishes that strict compliance with its provisions was intended by Congress. Indeed, Senator McClellan, one of Title III's sponsors, stated during Senate hearings on the bill:

> "[I would have it] very *strictly observed.* It is not to become a catchall for promiscuous use. I want to see this law *strictly observed* with the courts adhering to the spirit and intent of it in granting the orders." (Emphasis supplied.) (Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 508 [1967]).*

* See also, individual views of Senators Eastland (Senate Report No. 1097, 90th Cong., 2d Sess. 67 [1968] at 220) and Dirksen, Hruska, Scott and Thurmond (*id.*, at 225).

Significantly, following the first year of Title III's procedures being in effect, Senator McClellan commented:

> "I hope * * * that our judiciary * * * is always taking the necessary time to examine and pass on all applications thoroughly. The part they must play in scrutinizing and questioning these applications as well as requiring *strict adherence* to the statutory standards cannot be overemphasized.
>
> * * *
>
> "[T]he only way this legislation will be effective * * * is by *strict adherence* to the standards it contains.
>
> * * *
>
> "If the statute is *strictly* followed, it is certainly not to be expected that any unnecessary invasion of privacy will result." (Emphasis supplied.) (115 Cong. Rec. 23240-42 [1969]).

The Second Circuit's use of a "substantial compliance" test in the circumstances of this case, where the government's factual showing on the issue of necessity for the wiretap was concededly weak, represents a serious departure from the strict adherence to the spirit and plain language of Title III envisioned by Congress and required by this Court.

Certiorari should be granted to establish nationwide that there must be strict government compliance with Title III's requirement that a "full and complete" factual showing be made establishing that normal investigative procedures are unlikely to succeed if tried.

Conclusion

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY S. ARKIN, P.C.
300 Madison Avenue
New York, New York 10017
(212) 869-1450
Attorneys for Petitioner

STANLEY S. ARKIN
MARK S. ARISOHN
Of Counsel

January, 1976

APPENDICES

Appendix A

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1150

UNITED STATES OF AMERICA,

Appellee,

v.

STUART STEINBERG, WILLIAM CAPO,
HOWARD KAYE and JAMES PARKER,

Defendants-Appellants.

Decided November 10, 1975

Appeals from judgments of the District Court for the Southern District of New York, Robert J. Ward, *Judge,* convicting appellants, after jury verdicts, of violating various federal narcotics laws.

BEFORE:

MOORE, FRIENDLY and VAN GRAAFEILAND,

Circuit Judges.

VAN GRAAFEILAND, *Circuit Judge*:

Appellants Stuart Steinberg, William Capo, Howard Kaye and James Parker appeal from judgments of conviction entered after a jury [verdict] in the Southern District of New York found them guilty of conspiracy to violate the federal narcotics laws (21 U.S.C. §846 (1970)) and, on varying counts, of knowingly using the telephone to cause and facilitate the conspiracy (21 U.S.C. §843(b) (1970)).[1] Steinberg and Capo also appeal from their convictions on three substantive counts of distributing and possessing with intent to distribute phencyclidine hydrochloride ("PCP"), a Schedule III controlled substance.

The convictions of Steinberg and Capo are affirmed. Because the evidence was insufficient to link appellants Kaye and Parker with the conspiracy charged, their convictions are reversed.

Facts

On June 26, 1973, an informant, Ricky Citrola, introduced DEA Special Agent Brian Noone to appellant Steinberg as the representative of a man with money to invest in drugs. Steinberg gave Noone a .21 gram sample of PCP and indicated that he could supply large quantities of the drug. The next day Noone purchased two ounces of PCP for $2,400, and on July 10, one-half pound for $8,000. Appellant Capo was one of the suppliers of the PCP involved in these deliveries.

In various telephone conversations, occurring between July 10 and July 18, Noone and Steinberg discussed a 20-

1. Seven others were co-defendants in the conspiracy count. Five pleaded guilty, one died, and the case against the seventh was severed.

pound PCP transaction and also negotiated the terms of a 50-pound deal for $680,000. A wiretap was then installed on Steinberg's telephone following which Noone called Steinberg and confirmed the 50-pound purchase. Steinberg also agreed to provide a cocaine sample.

On July 24, Steinberg was informed by one of his suppliers that a hold would have to be put on the 50-pound transaction because the supplier's source had been arrested. Steinberg informed Noone of a "delay" in the PCP deal and suggested proceeding instead with a cocaine sale which had also been discussed.

To his dismay, Steinberg found that the cocaine which he had been planning to sell to Agent Noone was of inferior quality. He therefore called appellant Kaye seeking 50 pounds of the drug. Kaye said he could obtain it in California but informed Steinberg on the next day that he would not "do" the transaction.

On July 26 the wiretap on Steinberg's phone intercepted a call from appellant Parker to one Sara Werman in which he arranged the purchase of a quarter ounce of hashish oil for $125. Parker told Werman that she should deliver the oil to Steinberg's place and that Steinberg would give her the money if he was not there. Werman dropped the drug off, and later that evening discussed a potential one-ounce transaction with Kaye.

During the following week Steinberg expanded his efforts to make a large-scale sale to Noone, offering large quantities of seconals and tuinals, hashish, and marijuana, without success.

Adequacy of Wiretap Applications and Orders

Appellants Steinberg and Capo vigorously assail the denial of their motion to suppress the information obtained from the wiretap. They contend that the application for the wiretap order did not contain the requisite "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . ."[2] 18 U.S.C. §2518(1)(c) (1970). See 18 U.S.C. §2518(3)(c) (1970).

The application, which merely tracked the language of section 2518(1)(c), incorporated by reference the supporting affidavit of Agent Noone. Paragraphs 4 through 9 of that affidavit describe the progress of Noone's investigation, beginning with his introduction to Steinberg and including the three PCP deliveries which had taken place. The affidavit indicates that the two PCP sales had been initiated and arranged by telephone, and that Steinberg, at least upon occasion, contacted his suppliers in this manner. On one of these occasions, Noone heard Steinberg assure them that Noone would not be present when a PCP delivery was made, that Steinberg was aware that the suppliers did not want to meet Noone and that Noone did not want to meet them. The affidavit goes on to describe the arrangements (largely telephonic) which had been made for the 20-pound PCP purchase. Based on Noone's experience, the previous deliveries and Steinberg's representation that he could supply an unlimited quantity of PCP from an out-of-state laboratory, Noone concluded that Steinberg and his suppliers were engaged in major distributions of PCP. Paragraph 11 of the affidavit states:

> **Normal investigative procedures have not succeeded in establishing the full extent of the activities conducted by Stuart L. Steinberg related to the purchase or sale of controlled substances, nor have the location and identity of the source of Stuart L. Steinberg's supply been established. Normal investigative procedures reasonably appear to be unlikely to succeed in obtaining the evidence necessary for the following reasons:**
>
> **A. At this time there is no known undercover access to his supplier and no chance of developing such access because of the covert manner in which Stuart L. Steinberg operates; and**
>
> **B. My experience and the experience of other Special Agents of the Drug Enforcement Administration has shown that individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance by Federal and State law enforcement personnel. Such dealers very rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization.**

Although the affidavit provides little factual basis for concluding that normal investigative techniques had not "suffice[d] to expose the crime," *United States* v. *Kahn*, 415 U.S. 143, 153 n.12 (1974), paragraphs (1)(c) and (3)(c) of §2518 are in the disjunctive; and the Government's

2. Appellant Steinberg also attacks the order renewing the wiretap on similar grounds. Since Steinberg's arguments with regard to the application for renewal are directed at language similar to that used in the original documentation, our discussion of the adequacy of this language in the original application is dispositive of the adequacy of its renewal counterpart.

main reliance is upon the second alternative provided by the statute.[3] We must view the affidavit as a whole and "in a practical and commensense fashion," S.Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Congressional and Administrative News 2190. While the Government will be well advised in the future to include a more detailed factual statement indicating the inadequacy of other investigative techniques, the affidavit herein did contain enough data to permit the authorizing judge reasonably to conclude that other means would be unlikely to succeed in revealing the scope of Steinberg's operation and his sources of supply.

When one endeavors to prove a negative, it is difficult to be very specific about it; and we are loathe to set impossibly burdensome standards. *See United States* v. *Staino,* 358 F.Supp. 852, 856-57 (E.D.Pa. 1973); *United States* v. *Falcone,* 364 F.Supp. 877, 888-89 (D.N.J. 1973). We are satisfied that the Government has substantially complied with the statutory mandate, and we note that on oral argument appellants could advance no logical alternative to wiretapping to ascertain the details of Steinberg's operation. Indeed, wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation. *Falcone, supra,* 364 F.Supp. at 889.

Assuming *arguendo* that the wiretap application was sufficient on its face, appellant Capo nevertheless contends

3. This conclusion is supported by paragraph 3 of the affidavit in which Noone stated: "I allege the facts contained in the numbered paragraphs to show that: . . . (c) Normal investigative procedures reasonably appear unlikely to succeed, or are too dangerous to be used . . . ."

that he is entitled to a hearing to test the truth of certain statements made therein. To be entitled to such a hearing, there must be "an initial showing of falsehood or other imposition" on a judicial officer. *United States* v. *Dunnings,* 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied,* 397 U.S. 1002 (1970).

Capo claims to have made this showing in three different ways. None is persuasive. His claimed "discrepancy" between Steinberg's open dealings with Noone and Noone's allegation of covert operations was no discrepancy at all insofar as Steinberg's suppliers were concerned. His argument that failure to disclose the true nature of Ricky Citrola's relationship with the Government constituted a misrepresentation by omission is defective in its assumption that Noone recognized Citrola as a source for the information sought to be obtained. The affidavit did not say that there was no known undercover access to Steinberg but rather that there was no known access to Steinberg's suppliers because of his modus operandi. On August 6, well after the date of the Noone affidavit, Steinberg himself indicated that Citrola would have to be introduced to Steinberg's suppliers. Finally, we decline Capo's invitation to find a misrepresentation from Noone's failure to mention that on July 10, 1973, Capo was observed by DEA Agent Jordison entering Steinberg's apartment building. There is no indication that Noone was aware of this fact when he prepared his affidavit nor any evidence that Capo's identity or his role as a supplier was known even to Jordison at the time of the wiretap application. We conclude that Capo has not made the showing prerequisite to a hearing on the veracity of the Noone affidavit.

Steinberg's remaining arguments relating to the wiretap application and order can be disposed of briefly. He initially asserts that the application neither requested nor set forth facts justifying continued interception of communications after the first overheard narcotics-related conversation and that, therefore, subsequent intereceptions were illegal under 18 U.S.C. §2518(1)(d)(1970). However, permission to conduct extensive wiretapping was clearly requested, and Agent Noone's affidavit established probable cause to believe that additional communications of the type sought would occur after the initial interception. Indeed, the very scope of the operations described in the affidavit made it highly likely that numerous narcotics-related communications would take place in the future. *See* 1968 U.S. Code Congressional and Administrative News, *supra*, at 2190.

Finally, Steinberg contends that the language in the wiretap order was not sufficiently precise, either as to scope or duration, to comport with Fourth Amendment requirements as set forth in *Berger* v. *New York*, 388 U.S. 41 (1967) and *Katz* v. *United States*, 389 U.S. 347 (1967). This claim is without merit. Judge Stewart's order authorized wiretapping, with progress reports at five-day intervals:

> Until communications are intercepted which reveal the details of the scheme which has been used by Stuart L. Steinberg and others as yet unknown, to distribute, deliver and possess with the intent to distribute and otherwise illegally deal in narcotics and dangerous drugs, and the identity of their confederates, their places of operation, and the nature of the conspiracy involved therein or for a period of twenty (20) days from the date of the order, whichever is earlier.

When, as here, a continuing course of criminal conduct is involved, a wiretap order must necessarily be framed flexibly enough to permit intereception of "any statements concerning a specified pattern of crime." *United States* v. *Tortorello*, 480 F.2d 764, 780 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). *See also United States* v. *Poeta*, 455 F.2d 117, 121 (2d Cir. 1972). Though the instant order was couched in general terms, the intereceptions authorized thereby were clearly limited in purpose and duration to the narcotics offenses described. This was sufficient to satisfy the Fourth Amendment in the context of an ongoing drug operation. Judge Stewart's use of interim reports as a means of imparting maximum specificity into an order which, of necessity, had to be broadly phrased removed any doubt on this score.[4]

The Charge

At trial, Steinberg sought to show that, due to his chronic drug intoxication, he lacked the specific intent required by the crimes with which he was charged. Although the judge charged as requested on this issue, he also included Steinberg in an insanity instruction which was applicable only to Kaye. In so doing he erred. Steinberg's lack of specific intent defense, based on his asserted abnor-

4. Steinberg also argues that the August 20, 1973 renewal order was unconstitutionally broad in scope because it authorized a flat 10-day extension of the original order without further stating that intereceptions must cease upon attainment of the objective of the authorization. *See* 18 U.S.C. §2518(5) (1970). As a renewal of the July 20 order, the August 20 extension incorporated by reference the limitation language of the original order. *United States* v. *Bynum*, 475 F.2d 832, 835 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974).

mal mental condition, while superficially similar to the mental defect or disease defense relied on by Kaye, is legally distinct and less difficult to establish. *United States* v. *Brawner,* 471 F.2d 969, 998-1003 (D.C.Cir. 1972); *United States* v. *Freeman,* 357 F.2d 606 (2d Cir. 1966).

The error does not require reversal, however. The court offered to correct its charge, although not in the precise manner desired by counsel. More to the point, we do not believe that Steinberg was entitled to his requested charge at all. This defense, which has a most limited application to a continuing course of conduct like Steinberg's, required proof. *See United States* v. *Clark,* 498 F.2d 535, 537 (2d Cir. 1974). Although there was evidence that Steinberg used drugs, his lay witness did not testify as to specific instances of drug intoxication; and his expert witness had no knowledge of how the drugs affected him or how much of them he took in 1973. There was thus no proof of drug intoxication at times which were relevant to the crimes. Steinberg, therefore, received a more favorable charge than that to which he was entitled.

Steinberg also claims error in the trial court's refusal to charge that Steinberg's allegedly susceptible mental state caused by drug intoxication could be considered in weighing the inducement element of his entrapment defense. We do not agree. Inducement is not established by showing how little it would take to cause a particular defendant to commit a crime. Rather, the focus is on the nature and extent of the Government's invitation. *United States* v. *Riley,* 363 F.2d 955, 957-58 (2d Cir. 1966); *United States* v. *Sherman,* 200 F.2d 880, 882-83 (2d Cir. 1952). Here the Govern-

ment did not seriously dispute that, to use some of Judge Hand's words, it initiated, broached or suggested the commission of the offense charged. Steinberg's real contention seems to be rather that, because of his drug addiction, acts that would normally constitute such uncontradicted evidence of propensity as to eliminate any need for an entrapment charge should not be so regarded. However, in *United States* v. *Henry,* 417 F.2d 267 (2d Cir. 1969), *cert. denied,* 397 U.S. 953 (1970), we rejected a similar contention even in a case where the defendant allegedly was experiencing withdrawal symptoms.

Each appellant was convicted on one or more counts of using a communications facility "in committing or in causing the commission of any act or acts constituting a felony" under the narcotics laws. 21 U.S.C. §843(b) (1970). In each instance, the "act constituting a felony" was "the conspiracy set forth in Count One" of the indictment. Appellant Steinberg contends that the §843(b) counts fail to charge a crime because a conspiracy is an "agreement" and not an "act" within the meaning of §843(b). He supports this claim by comparing §843(b) with its predecessor, 18 U.S.C. §1403(a) (1964), which proscribed use of a communications facility in committing "any act or acts constituting an offense *or a conspiracy to commit an offense* . . ." Emphasis added. The failure to carry over the conspiracy language of §1403(a) to its successor is said to evince an intent not to make narcotics conspiracies subject to communications facility charges.

We reject this argument. We see no reason why the making of a conspiratorial agreement is any less an "act" within the meaning of §843(b) than the actual distribu-

tion of narcotics. Section 843(b) proscribes acts, not overt acts.

Moreover, the result contended for by Steinberg is totally at odds with the general purpose of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§801 *et seq.*, which sought to strengthen existing law enforcement authority in the field of drug abuse, not weaken it. H.R.Rep. 91-1444, 91st Cong., 2d Sess., 1970 U.S. Code Congressional and Administrative News 4556, 4657. Here, canons of statutory construction must give way to common sense. *See United States* v. *Whitridge*, 197 U.S. 135, 143 (1905). Surely, if Congress had intended to carve conspiracy out of §843(b), such a clear break with prior law would have prompted some legislative discussion. However, the only specific reference to §843(b) in the legislative history concerns a prohibition against using a communications facility "in committing or facilitating the commission of a felony . . . ." *Id.* at 4616. Our construction of §843(b) is wholly consistent with this statement of legislative purpose.

Conspiracy Issues

Once again, we are met with the claim of a single conspiracy charged and multiple conspiracies proven. *See, e.g., United States* v. *Miley*, 513 F.2d 1191, 1205 (2d Cir. 1975). Once again, after reviewing the record, we conclude that the jury was entitled to find but a single conspiracy.

The evidence satisfactorily established that appellant Steinberg was the key figure or middleman in an organization engaged in the large scale distribution of PCP and cocaine. His sources of supply included appellant Capo

and at least four other individuals who pled guilty to the conspiracy charge. In view of the substantial quantities involved, knowledge of the vertical scope of the operation may reasonably be imputed to the individual co-conspirators. They could hardly have believed that the large amounts of drug received by Steinberg were not to be resold. *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). Moreover, there was ample evidence to demonstrate their awareness of the conspiracy's horizontal scope. *See United States* v. *Borelli*, 336 F.2d 376, 383 (2d Cir.), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1964); *United States* v. *Miley, supra*, 513 F.2d at 1207. Indeed, most of the individuals on the supply level were mutual friends.

Although the judge was justified in submitting the case to the jury on the theory of a single conspiracy, this does not end the case as to appellants Kaye and Parker. Because there was insufficient evidence that these appellants "entered, participated in, or furthered the conspiracy," *United States* v. *Cianchetti*, 315 F.2d 584, 587 (2d Cir. 1963), we reverse their conspiracy convictions and their substantive communications facility convictions, which are predicated thereon.

Although Kaye did tell Steinberg that he could get 50 pounds of cocaine in California "in fifteen minutes," he was skeptical that Steinberg actually was involved in a 50-pound deal. Moreover, he was reluctant to get involved in a transaction of the magnitude proposed by Steinberg because he feared Mafia involvement and "didn't want to be killed." Following Steinberg's second call, Kaye un-

equivocally disassociated himself from the venture and four days later reiterated to Steinberg that he "wanted nothing to do with it."

As in *United States* v. *Cianchetti, supra,* 315 F.2d at 587-88, rather than revealing a stake in the outcome of the conspiracy, Kaye's statements were equivocal at best. There was no "fixed agreement" to participate; and while Kaye's motives may not have been "wholly laudatory," the fact remains that he did abstain. *Id.* In this context, Kaye's false exculpatory statement upon his arrest about his connection with Steinberg is entitled to little weight. *See United States* v. *Kearse,* 444 F.2d 62, 64 (2d Cir. 1971).

The case of appellant Parker is more troublesome. Parker did purchase a small quantity of drugs, and Steinberg participated to some extent in this transaction. However, there was no proof that this was part of Steinberg's operations except that Parker telephoned from Steinberg's apartment regarding the purchase and the hashish oil was delivered there and paid for with money loaned to Parker by Steinberg. There was no evidence that Parker resold the drug to Steinberg. In fact, Steinberg told a third party that Parker was the man to see for "oil."

The proof demonstrates little more than that Parker and Steinberg were friends and fellow drug users. Association with a conspirator, without more, is insufficient to establish the requisite degree of participation in a conspiratorial venture, *see United States* v. *Ragland,* 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied,* 390 U.S. 925 (1968); *United States* v. *Fatnuzzi,* 463 F.2d 683, 690 (2d Cir. 1972); nor does it provide a sufficient basis for the admission of hearsay statements of alleged co-conspirators. *Id. United*

States v. *Purin,* 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied,* 417 U.S. 930 (1974), relied on by the Government, is factually inapposite to this case.

We believe that Parker's motion for a new trial should have been granted, and we remand to the District Court for this purpose. Proof of Kaye's involvement in the conspiracy being totally absent, we think the interests of justice are best served by directing a judgment of acquittal as to him. It is so ordered.

Judgments of conviction as to the defendants Steinberg and Capo are affirmed. Judgments of conviction as to the defendants Parker and Kaye are reversed with directions.

FRIENDLY, *Circuit Judge,* concurring and dissenting:

I join in the majority's disposition of this appeal except for its directing of a new trial of Parker after correctly reversing for lack of proof his convictions on the conspiracy count and a related count for use of a communications facility in furtherance of the conspiracy. My brother Van Graafeiland's opinion convincingly demonstrates that the Government failed in its proof of Parker's participation in the conspiracy and that an acquittal ought to have been directed. Although *Bryan* v. *United States,* 338 U.S. 552 (1950), sustains our power to direct a new trial rather than a judgment of acquittal under such circumstances, it does not demand that the power be exercised in a case like Parker's where there is no reason for thinking, as the majority of the Court of Appeals did there, that "the defect in the evidence might be supplied on another trial. . . ."

338 U.S. at 559. For a still more restrictive reading of *Bryan*, see *United States* v. *Howard*, 452 F.2d 1188, 1191 (9 Cir. 1970) (concurring opinion of Judges Ely and Hufstedler). At the very least the district court should be left free to decide, as Justices Black and Reed suggested in *Bryan*, 338 U.S. at 560, whether in light of this court's opinion a new trial should be granted or a judgment of acquittal entered with respect to Parker. The Government, of course, is free, if it should so desire, to seek a new indictment of Parker for the substantive offenses indicated by its evidence.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of November one thousand nine hundred and seventy-five.

Present: HON. LEONARD P. MOORE
HON HENRY J. FRIENDLY
HON. ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

75-1150

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM CAPO, HOWARD KAYE, JAMES PARKER,
STUART L. STEINBERG,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Opinion and Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments and orders of said District Court be and they hereby are affirmed as to appellants Stuart Steinberg and William Capo.

It is further ordered, adjudged and decreed that the judgments of said District Court as to appellants Howard Kaye and James Parker be and they hereby are reversed and that the actions as to them be and they hereby are remanded to said District Court with directions in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Appendix B

Memorandum Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 1095

R.J.W.

UNITED STATES OF AMERICA,

Plaintiff,

against

STUART STEINBERG, *et al.*,

Defendants.

Defendant Stuart Steinberg moves, and defendants John Perlman, Stephen Effron, Howard Kaye and James Parker join, in a motion for an order pursuant to Rules 12(b) and 41(f), Fed. R. Crim. P., 18 U.S.C. §2518(10)(a), and the Fourth Amendment to the United States Constitution suppressing the contents of all intercepted conversations and evidence derived therefrom. For the reasons which follow, the motion is denied.

The evidence sought to be suppressed includes the contents of telephone conversations intercepted pursuant to orders of this Court dated July 20, 1973 and August 20,

1973, and all evidence derived therefrom, upon the grounds that the communications were unlawfully intercepted, the orders of authorization under which the communications were intercepted are insufficient on their face, and the interceptions were not made in conformity with the orders of authorization.

Steinberg argues that the issuance of the wiretap order of July 20, 1973 was unjustified and that the facts submitted to the judge to whom the application for an order was made were inadequate. Defendant argues that in violation of 18 U.S.C. §§2518(1)(c) and (3)(c), wiretapping was resorted to reflexively as the initial step in the government's investigation despite the availability and practicability of traditional investigative techniques. However, a review of the government's application belies this argument. The investigation had been in progress for almost a month, $11,200 in government funds had been expended to purchase approximately three-quarters of a pound of phenycyclidine hydrochloride ("PCP"), a controlled substance, from Steinberg, and his source or sources of the controlled substance remained undisclosed. While defendant argues that traditional investigative techniques would have sufficed, the fact is that they had not up to that point. This Court finds that the application substantially complied with the statutory requirement and the issuance of the July 20, 1973 order was proper. *See U.S.* v. *Falcone,* 364 F. Supp. 877, 889-890 (D.N.J. 1973).

Steinberg next argues that continuation on the wiretap beyond the first interception was illegal since the original and renewal wiretap applications failed to specifically re-

quest that the authorization to intercept not automatically terminate upon the first interception of a communication of the type described in the application and failed to include a description of facts establishing probable cause to believe that more than one communication of the type described would occur.

Since the nature of the investigation was such as to embrace the conduct of multiple parties over a period of time, a continuation on the wiretap beyond the first interception was justified and met Fourth Amendment requirements. *See U.S.* v. *Poeta,* 455 F.2d 117, 120-121 (2d Cir. 1972).

In addition, Steinberg argues that the order of August 20, 1973 was unlawful in that there was no showing of probable cause as to the time it was issued. He argues that the information asserted as the predicate for probable cause on August 20, 1973 was stale in that all of the underlying facts had occurred on and before August 7. Inasmuch as Steinberg has not refuted the government's allegation that he was on vacation during most of the intervening 13 days, and since there is no indication that anything else had changed, this argument must fail.

Steinberg next argues that the alleged failure to seal the application to renew the initial wiretap order violates 18 U.S.C. §2518(8)(b) and that *all* communications intercepted pursuant to *both* orders must be suppressed. Defendant misconceives the statutory purpose for sealing and offers no federal case support for his argument. Indeed, contrary authority is found in *U.S.* v. *Cantor,* 470 F.2d 890, 892-893 (3d Cir. 1972). Absent a showing of prejudice to

any of the defendants, this branch of the motion must be denied.

Finally, defendant argues that a minimization hearing is required based on a comparison of the number of calls intercepted with the number of pertinent calls as set forth in the affidavit of Special Agent Frederic Boff, dated November 28, 1973. Defendant having made no *prima facie* showing based on the wiretap logs which have been made available to counsel, this branch of the motion must also be denied. Accordingly, the motion is in all respects denied.

It is so ordered.

Dated: December 27, 1974

(Signed) Robert J. Ward
United States District Judge

Appendix C

Application for Wiretap and Supporting Affidavit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Application of the United States of America in the Matter of any order authorizing the interception of wire communications.

State of New York)
County of New York)
Southern District of New York) ss.:

JOHN P. COONEY, JR., as Assistant United States Attorney for the Southern District of New York, being duly sworn, states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Drug Enforcement Administration United States Department of Justice, Washington, D. C., together with agents of the Drug Enforcement Administration.

Application for Wiretap and Supporting Affidavit

1. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable Elliot Richardson has authorized this application for an order authorizing the interception of wire communications.

3. This application seeks authorization to intercept wire communications of Stuart L. Steinberg and others as yet unknown, and their suppliers and customers, concerning offenses enumerated in Section 2516 of Title 18, United States Code—that is, offenses involving the illegal distribution, delivery and possession with the intent to distribute and otherwise illegal dealings in narcotics and dangerous drugs, to wit: Phenycyclidine Hydrochloride (hereinafter referred to as "PCP") controlled under Schedule III of 21 U.S.C. 812 in violation of Section 841(a), of Title 21, United States Code; the use of communications facilities in committing or causing the facilitation of the commission of the foregoing offenses in violation of 21 U.S.C. 843(b); and conspiracy to violate the foregoing statutes in violation of 21 U.S.C. 846, which have been committed and are being committed by Stuart L. Steinberg and others as yet unknown.

Application for Wiretap and Supporting Affidavit

4. He has discussed all the circumstances of these offenses with Special Agent Brian J. Noone of the New York Office of the Drug Enforcement Administration who has conducted the investigation herein and has examined the affidavit of Special Agent Brian J. Noone (attached to this application as Exhibit "B", and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Stuart L. Steinberg and others as yet unknown, have committed, and are committing, offenses involving illegal distributing, delivering, and possession with intent to distribute and otherwise illegal dealing in controlled substances, to wit: PCP, controlled under Schedule III of 21 U.S.C. 812, in violation, respectively, of 21 U.S.C. 841(a); the use of communications facilities in committing or causing the facilitation of the commission of the foregoing offenses in violation of 21 U.S.C. 843(b); and conspiracy to violate the foregoing statute in violation of 21 U.S.C. 846.

(b) there is probable cause to believe that wire communications concerning the offenses described in paragraph three (3), above, will be obtained through the interception, authorization for which is herein applied for. In particular, these wire communications will be between Stuart L. Steinberg, his suppliers or customers and others as yet unknown concerning:

(1) the date, time, place and manner in which controlled substances in Schedule III will be illegally delivered to or by Stuart L. Steinberg.

(2) The price Stuart L. Steinberg is to pay or receive for the controlled substances and the date, time, place and manner of payment for the drugs; and

(3) The nature and extent of the distribution system in which Stuart L. Steinberg and others as yet unknown are involved, the (identification of and) degree of involvement of these persons whose relationship to Stuart L. Steinberg is not fully known, and the identification and degree of involvement of others as yet unknown.

(c) Normal investigative procedures have been tried and failed to and further normal procedures reasonably appear to be unlikely to succeed and are too dangerous to be used, if tried.

(d) there is probable cause to believe that the telephone listed and unlisted in the name of Stuart L. Steinberg, located at 135 E. 35th Street, New York, New York, and carrying the telephone number 212-889-2606 and 212-889-2674 has been used, is being used, and will be used, in connection with the commission of the offenses described in paragraph three (3), and is commonly used by Stuart L. Steinberg and others as yet unknown.

5. To my knowledge no other application for authorization to intercept, or for approval of interception of, wire or oral communications involving any of the same persons, facilities, or places specified in this application has been made to any judge by any agent of the United States Government in connection with the instant investigation.

WHEREFORE, your affiant believes that probably [sic] cause exists to believe that Stuart L. Steinberg and others as yet unknown, are engaged in the commission of the above-described offenses, and that they have used, and are using, the telephone listed and unlisted in the name of Stuart L. Steinberg at 135 E. 35th Street, New York, New York, and bearing the telephone number 212-889-2606 and 212-889-2674 in connection with the commission of those offenses, that communications concerning these offenses will be intercepted to and from that telephone, and that normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Brian Noone, attached hereto and made a part hereof as Exhibit "B" attached affiant herewith requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Drug Enforcement Administration of the United States Department of Justice to intercept wire communications to and from the above-described telephone until communications are intercepted which reveal the details of the scheme which has been used by Stuart L. Steinberg and others with intent to distribute and otherwise illegally deal in narcotics and dangerous drugs, and the identity of their confederates, their places or operation and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of that order, whichever is earlier.

It is further requested that this court issue an order pursuant to the power conferred on it by Section 2518(4)(e)

Application for Wiretap and Supporting Affidavit

of Title 18, United States Code, directing that the New York Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant *forthwith* all information facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

United States of America

Applicant

(Signed) John P. Cooney, Jr.
Assistant U. S. Attorney

Affiant

[JURAT]

Application for Wiretap and Supporting Affidavit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

An Application by the United States of America for an Order Authorizing the Interception of Wire Communications Conducted on New York City Telephone #212-889-2606 and 889-2674

State of New York)
County of New York)
Southern District of New York) ss.:

BRIAN J. NOONE, Special Agent of the Drug Enforcement Administration, United States Department of Justice, being duly sworn, deposes and says:

1. I am an "investigative or law enforcement officer . . . of the United States" within the meaning of Section 2510(1) of Title 18, United States Code, that is, an officer of the United States who is empowered by law to conduct investigations of, make arrests for, offenses enumerated in Section 2516 of Title 13, United States Code.

2. I make this affidavit in support of an application which seeks authorization to intercept wire communications

to and from telephone numbers (212) 889-2606 listed in the name of Stuart L. Steinberg located at 135 E. 35th Street, Apartment 2-R, New York, New York and (212) 889-2674, an unlisted telephone number subscribed to by Stuart L. Steinberg at the same address concerning offenses involving violations of Sections 812, 841 and 846 of Title 21, United States Code, by Stuart L. Steinberg and other persons participating with him in said violations.

3. I have participated in the investigation of the offenses and as a result of my participation in the investigation and of reports made to me by agents with whom I have been working in the investigation, I am familiar with all circumstances of the offenses. On the basis of that familiarity, I allege the facts contained in the numbered paragraphs to show that:

(a) There is probable cause for belief that Stuart L. Steinberg, and other persons yet unknown have been and are now committing offenses enumerated in section 841(a) and section 846, Title 21, United States Code—that is, offenses involving the illegal distribution, delivery, possession with intent to distribute and otherwise illegal dealing in controlled substances, to wit: Phenycyclidine Hydrochloride (hereinafter referred to as "PCP") controlled under schedule III of 21 U.S.C. 812, in violation of section 841(a) of Title 21, United States Code; the use of communication facilities in committing or causing the facilitation of the commission of the foregoing offenses in violation of 21 U.S.C. 843(b); and conspiracy to violate the foregoing statutes in violation of 21 U.S.C. 846, which have been committed and are now being committed by Stuart L. Steinberg, and others as yet unknown.

(b) There is probable cause for belief that particular communications regarding confederates and locations involved in the illegal trafficking of narcotics and dangerous drugs will be obtained through the interception of wire communications, the authorization of which is being hereby applied for;

(c) Normal investigative procedures reasonably appear unlikely to succeed, or are too dangerous to be used;

(d) There is probable cause for belief that a telephone bearing the number (212) 889-2606 and 889-2674 located at 135 E. 35th Street, New York, New York, has been and is being used to carry out the offenses referred to in paragraph 3(a) above, and is more fully set forth hereinafter.

4. On or about June 26, 1973, an informant of Drug Enforcement Administration introduced me to an individual initially identified only as "Stewie Crystal" at 135 E. 35th Street, at Apartment 2-R and on that date I received a free sample of .8 grams of "PCP" from "Stewie Crystal". On the same date, "Stewie Crystal" gave me the telephone numbers (212) 889-2606 and 889-2674 as the telephone numbers of his apartment where he could be contacted for future transactions. Through references to the register of apartments at 135 E. 35th Street and through a check with the New York Telepone Security Office, it was determined that the telephone numbers (212) 889-2606 and 889-2674 and apartment 2-R at 135 E. 35th Street are registered to Stuart L. Steinberg.

5. On or about the evening of June 27, 1973, I telephoned Stuart L. Steinberg, using telephone number 889-2606, told Steinberg that I would come to Steinberg's apartment for the purpose of purchasing two (2) ounces of PCP. When Steinberg agreed to this, I proceeded to abovementioned apartment and there purchased fifty-eight (58) grams of PCP for $2400 from Stuart L. Steinberg.

6. On or about July 2, 1973, I telephoned Stuart L. Steinberg using the telephone number 889-2606 and stated that I and my "people" were pleased with the quality of the PCP purchased on June 27, 1973 and that I and my people might be interested in purchasing either one-half pound or one pound of PCP from Stuart L. Steinberg. Stuart L. Steinberg agreed to this proposition and Steinberg requested that I specify the exact weight so that Steinberg could, in turn, contact "his people" to make the quantity available. On July 3, 1973, I telephoned Steinberg using the telephone number 889-2606 and informed Steinberg that I had been unable to contact the principal for whom I was purchasing PCP and that further discussion of a second purchase of PCP from Steinberg should be put off until July 10, 1973. Steinberg acquiesced in this arrangement.

7. On or about the evening of July 10, 1973, I telephoned Steinberg using telephone number 889-2606 and informed Steinberg that I wished to come to Steinberg's apartment to discuss the quantity of the proposed second purchase of PCP from Steinberg. When Steinberg agreed to this, I went to Steinberg's apartment at 135 E. 35th Street and proposed to purchase from Steinberg one-half pound of

PCP for a price of $8800. Steinberg agreed to this offer and immediately called "his people" so that the PCP would be delivered to Steinberg at his apartment for sale to me later that evening. During the course of his conversation, Steinberg informed "his people" that I would not be there when they arrived, and that he was aware that they did not want to meet me and that I did not wish to meet them. Later that evening, I returned to Steinberg's apartment accompanied by Special Agent Arthur Anderson who was acting in an undercover capacity and, who was introduced to Steinberg as the principal for whom I had been acting. At the apartment, Steinberg delivered the one-half pound of PCP to me in exchange for $8800, as witnessed by Special Agent Anderson. At the same time, Steinberg and Special Agent Anderson and I discussed a third purchase of PCP which was to be in the amount of twenty (20) pounds. Steinberg instructed me to telephone him at 11:00 p.m. this same evening after he had had an opportunity to speak to "his people" about this proposed sale. Pursuant to this request, I telephoned Steinberg using telephone number 889-2606 at or about 11:00 p.m. at which time Steinberg stated that "his people" had just left his apartment and that they wanted to know the quantity of PCP which Special Agent Anderson and I wanted to purchase. Steinberg told me that "his people" could sell Special Agent Anderson and I from twenty (20) to fifty (50) pounds of PCP if we had the cash to make such a purchase. I told Steinberg that we would purchase fifty (50) pounds of PCP and that cash represented no problem to us.

8. On various dates after this meeting, I telephoned Steinberg using 889-2606 to check on the status of the pro-

posed third sale. On these occasions, Steinberg told me that he had not heard from "his people" and therefore, was unable to proceed with this proposed transaction.

9. On or about July 16, 1973, I telephoned Steinberg using 889-2674 and, after I inquired about the status of the proposed third purchase of PCP, Steinberg informed me that he and "his people" could sell me twenty (20) pounds of PCP, that the sale could be consummated on Monday, July 22, 1973, and that he would inform me of the details of the transaction at a later time.

10. From my experience, and knowledge of the facts developed in this investigation to date, it appears that Stuart L. Steinberg, and "his people" are engaged in major distributions of PCP. This conclusion is based on the deliveries of PCP made to me by Stuart L. Steinberg and the statements made to me by him that:

A. He could supply fifty (50) pounds of PCP to me.

B. He could, over a period of time, supply an unlimited amount of PCP to me from an out of state laboratory; and the presence of drug distribution equipment in his apartment, including scales and weights, which I observed in my contacts with Steinberg.

11. Normal investigative procedures have not succeeded in establishing the full extent of the activities conducted by Stuart L. Steinberg related to the purchase or sale of controlled substances, nor have the location and identity of the source of Stuart L. Steinberg's supply been established.

Normal investigative procedures reasonably appear to be unlikely to succeed in obtaining the evidence necessary for the following reasons:

A. At this time there is no known undercover access to his supplier and no chance of developing such access because of the covert manner in which Stuart L. Steinberg operates; and

B. My experience and the experience of other Special Agents of the Drug Enforcement Administration has shown that individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance by Federal and State law enforcement personnel. Such dealers very rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization.

12. In my opinion the intercepting of wire communications conducted by Stuart L. Steinberg over the telephones having numbers (212) 889-2606 and 889-2674 in conjunction with substantial controlled "orders" of PCP will disclose sufficient information to determine those from whom Stuart L. Steinberg is obtaining his supply, and to whom he is selling PCP, as well as the times, dates, places, and manner in which deliveries are effected.

13. For the reasons set out above all normal avenues of investigation are closed and it is my belief that the only reasonable way to develop the necessary evidence of violations of Sections 812, 841 and 846 of Title 21, United States Code, by Stuart L. Steinberg and his confederates is to

intercept wire communications to and from the telephone described in paragraph 3(d) above.

14. I have not, nor has any other agent of the United States Government to my knowledge, made any application to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in this affidavit.

WHEREFORE, your deponent respectfully requests this Court to issue an order pursuant to the power conferred on it by Title 18, United States Code, Section 2518, authorizing the Drug Enforcement Administration, Department of Justice, to intercept wire communications to and from (212) 889-2606 and 889-2674 located at 135 E. 35th Street, Apartment 2-R, New York, New York, for a period of 20 days from the effective date of that order or until such time as communications are intercepted which will: (a) reveal the identity of person or persons from whom Stuart L. Steinberg is illegally obtaining his drugs; (b) reveal the identity of any person or persons to whom he may be illegally selling drugs; and (c) reveal any other information as to the extent that Stuart L. Steinberg is involved in trafficking in illicit narcotics and dangerous drugs in violation of sections 812, 841 and 846 of Title 21, United States Code, and which reveal the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein.

(SIGNED) BRIAN J. NOONE
Special Agent
Drug Enforcement Administration

[JURAT]

Appendix D

Constitutional Provisions and Statutes Involved

I. CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. STATUTES:

18 U.S.C. §§2518(1)(c), (3)(c)

§2518. *Procedure for interception of wire or oral communications*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

• • •

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

• • •

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

• • •

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

Nos. 75-1040 and 75-6242

In the Supreme Court of the United States

OCTOBER TERM, 1975

STUART L. STEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM CAPO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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No. 75-1040

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the government's application for an order authorizing electronic interception did not sufficiently establish that other investigative procedures were inadequate. Petitioner Steinberg also contends that the court below used the wrong standard in evaluating the government's compliance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were

convicted of conspiracy to distribute Schedule I, II, and III controlled substances, in violation of 21 U.S.C. 846; distribution of a Schedule III controlled substance (phencyclidine hydrochloride ("PCP")), in violation of 21 U.S.C. 841(a)(1); and use of the telephone in furtherance of the conspiracy, in violation of 21 U.S.C. 843(b).[1] Petitioner Steinberg was sentenced to 18 months' imprisonment, a $10,000 fine, and three years' special parole. Petitioner Capo was sentenced to three years' imprisonment to be followed by two years' special parole. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).[2]

The facts are fully set forth in the opinion of the court of appeals. They indicate that on June 26, 1973, Special Agent Brian Noone of the Drug Enforcement Administration was introduced by an informant to petitioner Steinberg as the representative of a man who had money to invest in drugs. Steinberg gave Noone a small sample of PCP and indicated that he could provide large quantities of the drug. Noone purchased two ounces of PCP from Steinberg for $2,400 on June 27, 1973, and one-half pound for $8,000 on July 10, 1973. Petitioner Capo supplied some of the PCP involved in these transactions (Pet. App. A 2).

Between July 10 and 18, 1973, Noone had several telephone conversations with Steinberg relating to 20 and 50 pound PCP transactions, and Steinberg agreed to supply 50 pounds of the substance for $680,000. A wire interception

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[1]Indicted together with petitioners were Howard Kaye and James Parker, whose convictions were reversed by the court of appeals; John Perlman, Jeffrey Priesman, Susan Weinblatt, Stephen Effron, and Stanley Nicastro, who entered pleas of guilty; Jane Doe a/k/a "Sam," whose trial was severed from that of her co-defendants; and Michael Dorst, who died prior to trial.

[2]"Pet. App." refers to the appendix to petitioner Steinberg's petition, No. 75-1040.

was then placed on petitioner Steinberg's telephone, following which Noone called to confirm the 50-pound transaction (Pet. App. A 2 to A 3).

On July 24, 1973, Steinberg was advised by one of his suppliers that he would have to postpone the sale because the supplier's source had been arrested. Steinberg told Noone of the delay and suggested that they go ahead with a cocaine transaction which they had been discussing. When Steinberg found that the cocaine he had intended to sell Noone was of inferior quality, he unsuccessfully attempted to obtain 50 pounds of the drug from another source. During the following week, petitioner tried without success to sell Noone large quantities of seconals, tuinals, hashish and marijuana (Pet. App. A 3).

1. Petitioners contend that the government's application for a wire interception order did not contain the "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," required by 18 U.S.C. 2518(1)(c). We have recently discussed the requirements of Section 2518(1)(c) in our briefs in *Anderson* v. *United States,* No. 75-500, and *Green* v. *United States,* No. 75-962, petitions for writs of certiorari pending, and in *Lawson* v. *United States,* No. 75-659, certiorari denied, February 23, 1976, to which we respectfully refer the Court.[3] In brief, we there noted that the requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and commonsense fashion—a sufficient factual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation or is necessary to

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[3]We are sending petitioners copies of our briefs in these cases.

ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner*, 528 F.2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, December 1, 1975, No. 75-5330.[4]

In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein. *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4). Here, for example, the very nature of the crime under investigation—violation of 21 U.S.C. 843(b), which prohibits the use of the telephone in furtherance of a drug conspiracy—tended to make investigative techniques other than electronic surveillance unlikely to succeed. The issuing judge also may properly rely on the conclusions of experienced investigators in determining whether the interception is necessary (*United States* v. *Smith*, 519 F.2d 516, 518 (C.A. 9); see Pet. App. C 13), and his determination should be accorded substantial weight by the reviewing court (cf. *Jones* v. *United States*, 362 U.S. 257, 270-271).

Applying these principles to the present case, the courts below correctly found the application sufficient. Agent Noone's affidavit described the previous investigative efforts and explained why they had met with only limited success. He noted that Steinberg conducted much of his drug business over the telephone and that there was little possibility that the agents would be able to identify his

[4]Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. It does not require the government actually to try normal investigative techniques unless there is a reasonable likelihood that, if tried, such techniques would be successful. *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Falcone*, 364 F. Supp. 877, 889 (D. N.J.), affirmed, 505 F.2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

suppliers by means of undercover investigations (Pet. App. C 9 to C 13). In addition to describing the specific difficulties encountered in this investigation, Noone related the general experience of DEA agents that large-scale drug dealers "are particularly covert in their activities and wary of surveillance by Federal and State law enforcement personnel. Such dealers very rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization" (Pet. App. C 13). The specific description of Noone's dealings with petitioner Steinberg showed that petitioners were typical in this regard.[5]

In sum, the affidavit here satisfied the showing required by Section 2518(1)(c) as consistently interpreted by this Court and the great majority of lower courts that have considered the issue. But petitioners contend (Steinberg Pet. 8-9; Capo Pet. 6), that there is a conflict between this case and the recent decision of the Ninth Circuit in *United States* v. *Kalustian*, No. 74-3314, decided August 4, 1975.

We note first that the language in *Kalustian* upon which petitioners rely in defining the scope of the government's duty imposed by Section 2518(1)(c) was deleted when an amended opinion was issued by the panel on December 11, 1975, presumably in response to the government's petition for rehearing and suggestion of rehearing *en banc* (see Brief

[5]In a conversation between petitioner Steinberg and one of his suppliers, overheard by Noone, Steinberg assured the supplier that Noone would not be present when the drugs were delivered to Steinberg, since Steinberg recognized that neither party wished to meet the other. Petitioners imply (Steinberg Pet. 6; Capo Pet. 4, n. 2) that the suppliers' reluctance to meet the agent was related to the agent's own reluctance to have such a meeting. But clearly any expression of interest in such a meeting would have imperilled the agent's credibility in the eyes of the conspirators.

for the United States in *Anderson* v. *United States*, No. 75-500, App. 9a-10a). Thus, even the *Kalustian* panel has evidently rejected the standard relied upon by petitioners as overly stringent. Nevertheless, in finding the particular affidavit in issue there insufficient, the *Kalustian* panel still appears to be inconsistent with the interpretation of Section 2518(1)(c) adopted by this Court and the courts of appeals in other circuits. It is thus possible that a conflict is emerging on this issue between the Ninth Circuit and other courts of appeals that have considered the question, although at present the precise extent of the Ninth Circuit's departure from the standards applied by other circuits is not clear. Should a substantial conflict clearly develop that seems likely to affect a significant number of cases, we believe the issue would probably be of sufficient importance to justify resolution by this Court. At the present time, however, there appears to remain some internal inconsistency within the Ninth Circuit regarding the issue, and there are pending requests for *en banc* consideration by that court that, if granted, might eliminate the necessity for further review by this Court.[6] Accordingly, we believe that the question is presently not ripe for consideration by this Court.[7]

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[6]Our rehearing requests in *Kalustian* were denied March 25, 1976. A result similar to *Kalustian* was recently reached by a panel of the Ninth Circuit in an unpublished order in *United States* v. *Gross*, No. 75-2376, decided February 19, 1976, petition for rehearing with suggestion of rehearing *en banc* pending; and in *United States* v. *Pezzino*, No. 75-2305, decided January 23, 1976, petition for rehearing with suggestion of rehearing *en banc* pending, the panel applied *Kalustian* in finding that the affidavit in that case did satisfy the requirements of Section 2518(1)(c). Other panels of the Ninth Circuit have not imposed requirements as stringent as those used in *Kalustian*. See *United States* v. *Smith*, *supra*; *United States* v. *Turner*, *supra*. There are at least three other cases presently pending before the Ninth Circuit involving the same issues. *United States* v. *Pulliam*, No. 75-1383; *United States* v. *Zarowitz*, No. 76-1026; *United States* v. *Masterana*, No. 76-1027.

[7]Nor is it by any means clear that, in the particular circumstances of this case, the Ninth Circuit would reach a contrary result if it applied *Kalustian*.

2. In a related contention, petitioner Steinberg maintains (Pet. 12-15) that the court of appeals tested the government's compliance with Title III by an inadequate standard. He points to the court's conclusion (Pet. App. A 6) that "the Government has substantially complied with the statutory mandate" in its showing that normal investigative techniques would be inadequate. In context, we submit that this language does not indicate that the court was imposing any standard less than strict compliance with the statute.[8] A number of other courts have used the same language in holding that Title III requirements are met. See, *e.g.*, *United States* v. *Tortorello*, 342 F. Supp. 1029, 1036 (S.D. N.Y.), affirmed, 480 F.2d 764 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Falcone*, 364 F. Supp. 877, 889-890 (D. N.J.), affirmed, 505 F.2d 478 (C.A. 3), certiorari denied, 420 U.S. 955; *United States* v. *King*, 335 F. Supp. 523, 535 (S.D. Cal.), modified, 478 F.2d 494 (C.A. 9), certiorari denied, 417 U.S. 920; *United States* v. *Escandar*, 319 F. Supp. 295 (S.D. Fla.), reversed on the grounds *sub nom. United States* v. *Robinson*, 468 F.2d 189 (C.A. 5), on rehearing *en banc*, 472 F.2d 973.

The language used by the court below simply reflects the fact that in determining whether the government has adequately shown that other investigative techniques are unlikely to succeed or will be too dangerous, the court is dealing with questions of degree and should review the adequacy of the prior investigative efforts of the government in a practical and commonsense fashion. *United States* v. *James*, 494 F.2d 1007, 1015 (C.A. D.C.), certiorari

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[8]Indeed, the sentence concludes "and we note that on oral argument appellants could advance no logical alternative to wiretapping to ascertain the details of Steinberg's operation" (Pet. App. A 6). Petitioners have not suggested any such realistic alternatives in this Court.

denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; see also S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1964).

In any event, as noted above, regardless of the language used by the court below, its interpretation of Section 2518(1)(c) is entirely consistent with that of the great majority of courts that have considered the issue.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.